

## Message Text

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ORIGIN OPIC-06

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DRAFTED BY: OPIC/GC: PGILBERT

APPROVED BY: E/IFD/OIA:RJSMITH

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L/ARA:DAGANTZ

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R 052149Z MAR 75

FM SECSTATE WASHDC

TO AMEMBASSY SAN SALVADOR

UNCLAS STATE 049672

E.O. 11652: N/A

TAGS: EINV ES

SUBJ: OPIC BILATERAL AGREEMENT

1. ON JANUARY 29, OPIC REPS FREEMAN AND GILBERT ACCOMPANIED  
BY CLYDE TAYLOR MET WITH RICARDO CASTENADA AND OTHERS FROM  
MINISTRY, FOREIGN RELATIONS TO DISCUSS STATUS OF OPIC BILATERAL.

2. OPIC REPS PROMISED TO FURNISH CASTENADA WITH BRIEF INFORMAL  
MEMO EXPLAINING SUBROGATION RIGHTS UNDER BILATERAL. TEXT OF MEMO  
IN ENGLISH AND SPANISH FOLLOWS.

3. OPIC WOULD APPRECIATE EMBASSY FURNISHING CASTENADA WITH THIS  
INFORMAL MEMO. OPIC WOULD ALSO APPRECIATE EMBASSY MAKING ANY  
CHANGES IN SPANISH TRANSLATION WHICH IT DEEMS SUITABLE.

4. IN LIGHT OF CONVERSATION WITH CASTENADA OPIC HOPES PROVIDING  
MEMO WILL SPEED CONGRESSIONAL RATIFICATION OF OPIC-GOES BILATERAL  
SIGNED ON APRIL 28, 1969. OPIC IS POUCHING SEPARATELY FOR  
EMBASSY FILE A COPY OF APRIL 28, 1969 BILATERAL.

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5. SUBROGATION RIGHTS OF OPIC PURSUANT TO BILATERAL

AGREEMENT, DATED APRIL 28, 1969, BETWEEN  
THE GOVERNMENTS OF EL SALVADOR AND THE UNITED  
STATES OF AMERICA

A. INVESTMENT GUARANTEES ISSUED BY OPIC PROVIDE THAT UPON PAYMENT OF COMPENSATION TO THE INVESTOR FOLLOWING A CLAIM IN RESPECT OF A GUARANTEED INVESTMENT, OPIC WILL BE SUBROGATED TO ALL THE RIGHTS AND CLAIMS WHICH THE INVESTOR HAS OR MAY HAVE RESULTING FROM THE GUARANTEED INVESTMENT. THE INVESTOR IS GENERALLY REQUIRED TO ASSIGN TO OPIC THESE RIGHTS AND CLAIMS AS WELL AS THE SHARES, PROMISSORY NOTES OR OTHER SECURITIES EVIDENCING THE GUARANTEED INVESTMENT.

B. THE RIGHT OF A GUARANTOR TO BE SUBROGATED TO THE RIGHTS AND CLAIMS OF A GUARANTEED PARTY FOLLOWING PAYMENT UNDER THE GUARANTY IS EQUALLY WELL ESTABLISHED IN BOTH CIVIL LAW COUNTRIES AND COMMON LAW COUNTRIES. A BASIC PURPOSE OF THE RIGHT OF SUBROGATION IS TO ENABLE THE GUARANTOR TO PURSUE THE SAME RIGHTS AS THE GUARANTEED PARTY IN ORDER TO MAKE SOME RECOVERY, IF POSSIBLE, THEREBY REDUCING THE ULTIMATE AMOUNT OF LOSS.

C. THE LEGISLATION WHICH CREATED OPIC REQUIRES OPIC TO MAKE CERTAIN THAT SUITABLE ARRANGEMENTS EXIST TO PROTECT OPIC'S INTEREST IN CONNECTION WITH RIGHTS OR CLAIMS TO WHICH OPIC MAY BECOME SUBROGATED AS A RESULT OF A PAYMENT UNDER A GUARANTY. OPIC COMPLIES WITH THIS STATUTORY REQUIREMENT BY NOT OPERATING ITS PROGRAMS IN A COUNTRY UNLESS THE GOVERNMENT OF THE PROJECT COUNTRY FIRST AGREES THAT OPIC'S PROGRAM CAN BE INSTITUTED. THE AGREEMENT ALSO PROVIDES, AMONG OTHER THINGS, THAT IF OPIC PAYS COMPENSATION TO AN INVESTOR, THE GOVERNMENT OF THE PROJECT COUNTRY WILL RECOGNIZE OPIC'S SUBROGATION RIGHTS WHICH IS THE RIGHT OF OPIC TO BE SUBSTITUTED IN PLACE OF THE INVESTOR SO THAT OPIC WILL HAVE THE VERY SAME RIGHTS AND CLAIMS WHICH HAD BEEN PREVIOUSLY HELD BY THE INVESTOR IN RESPECT OF THE GUARANTEED INVESTMENT. THUS FOR EXAMPLE, OPIC WOULD BE ASSURED THAT IT WOULD BE ABLE TO INSTITUTE AN ACTION AT LAW AGAINST A THIRD PARTY WHO WAS RESPONSIBLE FOR THE LOSS OR DAMAGE SUSTAINED BY THE INVESTOR, JUST AS THE INVESTOR COULD HAVE DONE.

D. THE PROVISION RECOGNIZING OPIC'S SUBROGATION  
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RIGHTS IN THE BILATERAL AGREEMENT BETWEEN THE GOVERNMENT OF EL SALVADOR AND THE UNITED STATES GOVERNMENT WILL DO NO MORE THAN STATE EXPLICITLY THE FACT THAT ONCE OPIC PAYS A CLAIM, IT CAN EXERCISE THE SAME RIGHTS AND PURSUE THE SAME REMEDIES THAT WERE AVAILABLE TO THE INVESTOR. INDEED THIS IS STATED EXPLICITLY IN PARAGRAPH 3 OF THE BILATERAL AGREEMENT: "NOTHING IN THE

SUBROGATION ENVISAGED HEREIN SHALL GIVE THE GOVERNMENT OF THE UNITED STATES GREATER RIGHTS AGAINST THE ASSETS OF THE ENTERPRISE FOR WHICH THE INVESTMENT GUARANTY WAS GRANTED THAN THE RIGHTS OF THE SUBROGATING INVESTOR"; AND IN PARAGRAPH 6(A) OF THE BILATERAL AGREEMENT , AGAIN WITH REFERENCE OT PARAGRAPH 3, "NONE OF THE PROVISIONS OF THIS AGREEMENT SHALL GIVE THE GOVERNMENT OF THE UNITED STATES OF AMERICA OTHER RIGHTS THAN THOSE HELD BY THE INVESTOR WITH RESPECT TO ANY PETITIONS, CLAIMS OR RIGHTS TO WHICH THE GOVERNMENT OF THE UNITED STATES OF AMERICA HAS BEEN SUBROGATED."

E. IN SUMMARY, THE BILATERAL AGREEMENT DOES NOT GIVE OPIC RIGHTS UNDER SUBROGATION WHICH ARE GREATER THAN THOSE THAT AN INVESTOR COULD HAVE ASSERTED UNDER THE LAWS OF EL SALVADOR. RATHER, OPIC AS SUBROGEE WOULD BE ASSERTING ONLY THOSE RIGHTS OF THE INVESTOR WHICH IT HAS SUCCEEDED.

5. DERECHOS DE SUBROGACION DE LA OPIC EN VIRTUD DEL ACUERDO BILATERAL DEL 28 DE ABRIL DE 1969 ENTRE EL GOBIERNO DE EL SALVADOR Y EL GOBIERNO DE LOS ESTADOS UNIDOS DE AMERICA

A. LAS GARANTIAS DE INVERSION EMITIDAS POR LA OPIC DISPONEN QUE UNA VEZ EFECTUADO EL PAGO DE LA COMPENSACION AL INVERSIONISTA DESPUES DE UNA RECLAMACION RESPECTO DE UNA INVERSION GARANTIZADA, LA OPIC QUEDARA SUBROGADA A TODOS LOS DERECHOS Y RECLAMACIONES QUE EL INVERSIONISTA TENGA O PUEDA TENER COMO RESULTADO DE LA INVERSION GARANTIZADA. GENERALMENTE, EL INVERSIONISTA TIENE QUE ASIGNAR A LA OPIC ESOS DERECHOS Y RECLAMACIONES ASI COMO LAS ACCIONES O LOS PAGARES O LOS OTROS VALORES QUE DEMUESTREN LA INVERSION GARANTIZADA.

B. EL DERECHO DEL GARANTE A SER SUBROGADO EN LOS DERECHOS UNCLASSIFIED

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Y RECLAMACIONES DE UNA PARTE GARANTIZADA DESPUES DEL PAGO CONFORME A LA GARANTIA, ESTA IGUALMENTE BIEN ESTABLECIDO EN LOS PAISES DE DERECHO ROMANO Y EN LOS DE DERECHO CONSUEUDINARIO. UNA FINALIDAD FUNDAMENTAL DEL DERECHO DE SUBROGACION ES LA DE PERMITIR AL GARANTE DISPONER DE LOS MISMOS DERECHOS QUE LA PARTE GARANTIZADA CON EL FIN DE REALIZAR ALGUNA RECUPERACION, DE SER POSIBLE, DISMINUYENDO ASI EL MONTO TOTAL DE LA PERDIDA.

C. LAS LEYES QUE CREARON A LA OPIC EXIGEN QUE LA OPIC SE ASEGURE DE QUE EXISTAN CIERTOS ARREGLOS ADECUADOS QUE LA PERMITAN PROTEGER SUS INTERESES EN RELACION CON DERECHOS O RECLAMACIONES EN LOS QUE LA OPIC PUDIERE QUEDAR SUBROGADA COMO RESULTADO DEL PAO CONFORME A UNA GARANTIA. LA OPIC ACATA ESTE REQUISITO DE LA KEY AL NO AUTORIZAR SUS PROGRAMAS EN UN PAIS A MENOS QUE EL GOBIERNO DEL PAIS DEL PROYECTO PRIMERAMENTE

ACUERDE QUE EL PROGRAMA DE LA OPIC PUEDE INSTITUIRSE. ESTE ACUERDO TAMBIEN DISPONE, ENTRE OTRAS COSAS, QUE SI LA OPIC PAGA COMPENSACION A UN INVERSIONISTA, EL GOBIERNO DEL PAIS DEL PROYECTO RECONOCERA LOS DERECHOS DE SUBROGACION DE LA OPIC LO QUE SIGNIFICA EL DERECHO DE LA OPIC A SER SUBSTITUIDA AL INVERSIONISTA DE FORMA TAL QUE LA OPIC TENDRA LOS MISMOS DERECHOS Y PODRA EFECTUAR LAS MISMAS RECLAMACIONES QUE ANTES DISPONIA EL INVERSIONISTA RESPECTO DE LA INVERSION GARANTIZADA. ASI ES QUE, POR EJEMPLO, LA OPIC TENDRIA LA SEGURIDAD DE QUE PODRIA INSTITUIR CARGOS CONTRA UNA TERCERA PART QUE FUERA RESPONSABLE DE LAS PERDIDAS O DANOS SUFRIDOS POR EL INVERSIONISTA, EN IGUAL FORMA QUE LO PODRIA HABER HECHO EL INVERSIONISTA.

D. LA DISPOSICION QUE RECONOCE LOS DERECHOS DE SUBROGACION DE LA OPIC EN EL ACUERDO BILATERAL ENTRE EL GOBIERNO DEL EL SALVADOR Y EL GOBIERNO DE LOS ESTADOS UNIDOS DE AMERICA NO HACE MAS QUE ESTIPULAR EXPLICITAMENTE EL HECHO DE QUE UNA VEZ QUE LA OPIC HAYA PAGADO UNA RECLAMACION PUEDE EJERCER LOS MISMOS DERECHOS Y DISPONER DE LAS MISMAS AVENIDAS DE SOLUCION QUE ESTABAN A LA DISPOSICION DEL INVERSIONISTA. ESTE PRECEPTO SE ESTIPULA EXPLICITAMENTE EN EL PARRAFO 3 DEL ACUERDO BILATERAL: "NADA DE LO QUE SE DICE EN LA SUBROGACION AQUI CONTEMPLADA, DARA AL GOBIERNO DE LOS ESTADOS UNIDOS MAYORES DERECHOS, SOBRE EL ACTIVO DE LA EMPRESA CON RESPECTO A LA CUAL HA EMITIDO LA GARANTIA DE INVERSION, QUE AQUELLOS QUE ASISTEN AL INVERSIONISTA QUE HA SUBROGADO"; Y EN EL INCISO (A) DEL PARRAFO UNCLASSIFIED

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6 DEL ACUERDO BILATERAL, TAMBIEN CON REFERENCIA AL PARRAFO 3, "NINGUNA DE LAS ESTIPULACIONES DEL PRESENTE ACUERDO OTORGARA AL GOBIERNO DE LOS ESTADOS UNIDOS DE AMERICA OTROS DERECHOS QUE AQUELLOS DE QUE DISPONIA EL INVERSIONISTA CON RESPECTO A CUALESQUIERA PETICIONES, RECLAMACIONES O DERECHOS EN LOS CUALES QUEDARA SUBROGADO EL GOBIERNO DE LOS ESTADOS UNIDOS DE AMERICA".

E. EN RESUMEN, EL ACUERDO BILATERAL NO OTORGA A LA OPIC CONFORME A LA SUBROGACION MAYORES DERECHOS QUE LOS QUE ASISTEN AL INVERSIONISTA CONFORME A LAS LEYES DE EL SAVADOR. MAS BIEN, LA OPIC, POR SUBROGACION, EJERCERIA UNICAMENTE LOS DERECHOS DEL INVERSIONISTA QUE LE HUBIEREN SIDO TRASPASADOS. INGERSOLL

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